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Federal Trade Commission
CAN-SPAM Act
P.O. Box 1030
Merrifield, VA 22116-1030

Re: CAN-SPAM Act Rulemaking
Project No. R411008

Introduction

These comments are submitted by the American Council of Life Insurers ("ACLI"), a national trade association representing 354 legal reserve life insurance companies operating in the United States. These 354 companies account for 69 percent of the life insurance premiums, 79 percent of annuity considerations, 51 percent of disability income premiums, and 81 percent of long-term care insurance premiums in the United States.

These comments are in response to the Commission's Notice of Proposed Rulemaking requesting public comment on several aspects of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act" or "the Act"). 70 *Fed. Reg.* 25426 (May 12, 2005) (the "Notice"). ACLI member companies are active participants in the Internet-based economy. Virtually all ACLI member companies maintain an online presence, with an increasing percentage of companies allowing customers and potential customers to download and submit applications online, and to exercise change of address and other administrative functions. In addition, ACLI member companies are increasingly using the Internet to communicate with agents and other third-parties who market and service life insurance policies and annuities. ACLI has actively participated in the Commission's prior proceedings on various CAN-SPAM Act initiatives, and we have submitted two previous comment letters to the Commission, dated March 31, 2004 and September 13, 2004.

ACLI does not at this time comment on two of the five proposed rules identified in the Notice (defining the term "person", and clarifying that a recipient cannot be required to pay a fee or take additional steps in order to exercise the opportunity to opt-out). ACLI submits comments on the remaining three issues (the definitions of "sender" and "valid physical postal address", and the proposed shortening of the opt-out processing period). ACLI urges the FTC to adopt a "safe harbor" for advertisers that utilize "e-list", e-mail service providers, or other third parties under specific conditions. ACLI also asks that an additional clarification be made with respect to "forward-to-a-friend" programs.

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Discussion

Section 316.4—Prohibition Against Failure to Effectuate an Opt-out Request within Three Business Days of Receipt.

ACLI strongly objects to the Commission's proposed shortening of the period allowed to effect an opt-out from ten to three business days. ACLI urges the Commission to reconsider this proposed rule and to instead provide for a thirty (30) day period.

The Commission had previously asked whether ten business days is a reasonable time for effectuating opt-out requests or whether the time frame should be shortened or lengthened. As indicated in the Notice, a majority of industry members responding to the Commission's previous request recommended that the period remain at ten business days or be lengthened. A majority of consumers favored shortening the period. Interestingly, nearly half the consumers commenting indicated that ten business days is an appropriate time period for processing opt-out requests. 70 *Fed. Reg.* at 25442. The Notice emphasized that persons advocating an increase in the ten day processing period provided "mere assertions" in support of their position and failed to provide empirical support for extending the ten business day processing period. Accordingly, the Notice stated that "[t]hus, there is insufficient basis for extending the opt-out period."

Having rejected requests for an extension of the ten business day processing period due to lack of empirical support, the Commission then proceeds simply to accept the "mere assertions" of those few commenters who indicate that ten business days provides spammers with an opportunity to engage in "mail-bombing." Other than mere assertions, the commenters provide no evidence in support of their position that "mail-bombing" during the ten business day period is an actual threat rather than a theoretical possibility. Moreover, the Commission ignores the fact that almost half the consumers commenting indicated that ten business days is an appropriate time period for processing opt-out requests. 70 *Fed. Reg.* at 25442. In view of these considerations, we believe that the Commission does not have an adequate basis in the record for shortening the ten business day time period for processing opt-out requests.

In enacting the CAN-SPAM Act, Congress determined that ten business days is an appropriate period of time to process opt-out requests. Congress authorized the Commission to exercise its discretion to decrease or increase the ten business day period only if the Commission determines that a different time frame would be more appropriate after taking into account the purposes of 15 U.S.C. § 7704(a), the interests of recipients of commercial e-mail and the burdens imposed on senders of lawful commercial e-mail. The evidentiary burden, therefore, rests on those who advocate changing the ten business day time period to provide evidence that takes into account the above statutory considerations.

The Commission relies heavily on the assertion that "ten days still gives a commercial spammers a lot of time to send junk." This statement, which the Commission found persuasive, is immediately followed by the Commission's acknowledgment that:

> These concerns were not supported by factual evidence that such practices actually occur, or that these practice would be eliminated by a shorter processing period. The Commission is including questions in Part VII to learn more about the volume

> of e-mail received from a particular sender after a recipient has submitted an opt-out request to that sender.

The Commission goes on to state that "while the record does not demonstrate whether fears of 'mail bombing' during an opt-out period are well-founded, the fact that many commentators already are able to process opt-out requests virtually instantaneously supports the conclusion that the period can and should be shortened." The Commission has therefore decided that because the empirical evidence supports neither an extension nor a shortening of the prescribed time period, it will nevertheless, substitute its judgment for that of Congress and substantially reduce (by seventy percent) the time period set forth in the law. We believe this is an improper use of the Commission's discretionary authority and is not supported by a factual record. Moreover, the characterization of the Congressionally mandated ten business day for processing opt-out requests as "unnecessarily generous" suggests that the Commission may already have pre-judged this matter and is not unbiased. The Commission should not substitute its judgment for that of Congress where, by the record, it has no factual support for its action.

A Three Day Period is not appropriate for Complex Businesses

A fundamental flaw in the Commission's rationale for a three day opt-out processing period is that it presumes the business methods and practices of pure Internet companies apply to all other entities. That is most certainly not the case. The Commission place relies heavily on a handful of comments of Internet businesses that indicated that they are capable of processing opt-out requests "virtually instantaneously." Thus, in the Commission's judgment, three days is an adequate period of time for all companies to process opt-out requests. We believe that the Commission cannot support this position based on current technologies. There are many differences between a business that operates as a single entity exclusively on the Internet and a complex financial services company, the operations of which are widely varied and dispersed geographically and across communications channels.

A three day opt-out period is not workable for a financial services company, such as insurers. For example, a life insurer's processes may be designed such that an e-mail list is created by necessity several days prior to the commencement of an e-mail campaign. A "scrub" of an e-mail list may take place after the list is pulled, and would include do-not-share, do-not-call, do-not-mail, and do–not-email information. For a large financial institution this is an enormous undertaking, even using state of the art technology. In addition, there are issues associated with aggregating information among affiliates, taking account of multiple databases, and including additional information from third-parties such as life insurance agents, who may be widely scattered and who submit information in different formats. Indeed, as indicated in comments to the Commission, the Act's ten business day processing period has proven burdensome to some small businesses with limited staff and resources. 70 *Fed. Reg.* at 25443. Moreover, the Notice provides absolutely no support for the statement that "nearly instantaneous processing of a recipient's request not to receive future e-mail messages can be accomplished without an undue burden." To the contrary, as indicated above, the record indicates that small businesses have stated that the Act's ten business day processing period has proven burdensome.

An Internet-only service provider likely does not contend with affiliates, dispersed agents and third parties, or the complexities of complying with multiple regulatory requirements governing varied business functions and communications channels. In addition, there is simply no public policy reason to make the timing shorter for handling opt-outs for e-mail than for other opt-outs, and in particular when it

would be so difficult and costly for legitimate businesses; businesses that have no desire to send e-mail to those who choose not to receive it.

The point made by some, and reflected in the Commission's commentary, that 10 days is a sufficient time for spammers to send junk e-mail to recipient, is accurate but irrelevant. One day is time enough for spammers to flood a recipient's inbox. If it is short term relief that the rule is intended to provide, then no time period other than instantaneous processing is short enough. If, however, the purpose is to protect consumers while permitting legitimate commerce to continue uninterrupted, the reasonable position is one that allows legitimate businesses, with already built and expensive processes to handle opt-outs, to comply within a reasonable timeframe and continue to do business in the usual manner. Moreover, a person or business that chooses to "mail bomb" an e-mail address in response to an opt-out request is not likely to honor opt-out requests, and is probably engaged in myriad fraudulent activities that the FTC and State Attorneys General could prosecute. The Commission, of course, could determine that "mail bombing" is an unreasonable practice and bar its use.

ACLI believes a thirty calendar day period appropriately recognizes the complexity of the commercially reasonable processes necessary to handle opt-outs across a large and varied organization. Ten calendar days is inadequate for a financial services company dealing with multiple databases, third-party e-mail list providers, and multi-channel advertising campaigns. Moreover, the Commission can always lower the effectuation time period if empirical evidence of abuses emerge, or if technological advances render faster opt-outs feasible.

Pursuant to the "safe harbor" provisions of the Commission's telemarketing sales rule, those subject to the do-not-call rule are allowed up to thirty-one calendar days to remove telephone numbers from call databases once the telemarketer receives notice or the consumer's exercise of his or her "do not call" rights. 16 *C.F.R. § 310.4(b)(iv)* Given the complexities associated with processing opt-out requests described above, we urge the Commission to conform its opt-out effectuation period to the current thirty day "safe harbor" provision contained in the Commission's telemarketing sales rule.

Section 316.2(m)—Definition of Sender

The Commission has created a three-part test to aid in determining the person that is the appropriate "sender" when more than one person's products or services are advertised in a single e-mail message. ACLI supports the Commission's effort to address the issues of multiple senders and multiple advertising content, but we urge the Commission to provide greater clarity to this important issue. The Proposed Rule helps identify a single sender in cases where there is multiple advertising content, but only one sender either: (1) controls the content; (2) determines the addresses to which the e-mail is sent; or is identified in the "from" line. This is helpful, but leaves far too many areas of ambiguity.

As just one example, life insurers often make available to insurance agents advertising copy that agents may, but are not required to, incorporate into their own communications. Life insurance is a highly regulated industry and many aspects of our industry, including the use of advertising materials, are closely reviewed by state insurance authorities. In some instances advertising materials must be pre-approved by state insurance authorities before use, and therefore cannot be altered. In our view, providing agents with such pre-approved text is not the type of control over the content of an e-mail that the Commission is intending to cover. In view of the highly regulated nature of the insurance industry, we request that the Commission clarify that an insurer does not control the content of a commercial e-

mail simply by providing an agent with pre-approved text that the agent may or may not choose to put into a commercial e-mail message because the agent makes the decision whether or not to send the e-mail to prospects, the agent makes the decision whether or not to include the text in the message, and the agent continues to have control over the remaining content of the message.

In this regard, ACLI asks that the Proposed Rule be modified such that Subsection 316.2(m) reads:

> (m) The definition of the term "sender" is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), *provided that*, when more than one person's products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act's definition will be deemed to be a "sender," *except that* if only one such person both is within the Act's definition and meets ~~one~~ two or more of the criteria set forth below, only that person will be deemed to be the "sender" of that message:
>
> (1) The person controls the content of such message;
> (2) The person determines the electronic mail addresses to which such message is sent; or
> (3) The person is identified in the "from" line as the sender of the message.

By requiring a sender to meet two of the criteria identified by the Commission, ACLI believes the exception will more closely achieve the desired balance of curbing spam and protecting legitimate business practices.

Designated "Sender" by Contract

ACLI asks the Commission to allow for the designation of a single "sender" by contractual agreement of two or more parties, provided that the criteria of the Act are met. Under the current Proposed Rule, there will be many instances of multiple sender e-mails that are likely to result in confusion for both consumers and senders as each tries to navigate the Act and the Commission Rules. We believe there would be no harm to consumers in allowing multiple senders to contractually agree on a designated "sender" for purposes of compliance with the Act. Such a contractual arrangement would not alter the obligations of the parties to, for example, "scrub" their respective e-mail lists in connection with a joint marketing campaign. It would, however, allow businesses and other senders to manage the opt-out process in an efficient manner, while at the same time addressing indemnification and other ancillary issues.

A single "sender" by contract could be accomplished by amending Section 316.2(m) to read:

> (m) The definition of the term "sender" is the same as the definition of that term in the CAN-SPAM Act, 15 U.S.C. 7702(16), *provided that,* when more than one person's products or services are advertised or promoted in a single electronic mail message, each such person who is within the Act's definition will be deemed to be a "sender", *except that,* such persons may designate by written agreement that a single person shall be the "sender", provided that all requirements of the Act are fulfilled or, if only one such person both is within the Act's definition and meets one or more of the criteria set forth below, ...

Section 316.2(p)—Definition of "Valid Physical Postal Address"

ACLI continues to support (see ACLI March 31, 2004 comment letter) inclusion of post office box within the definition of "valid physical postal address". It should make no difference to a consumer whether a business uses a street address or a post office box, and a business may have legitimate reasons for choosing to employ a post office box to receive certain kinds of mail. For example, a life insurer or other financial services company may incorporate the use of post office boxes into its overall security policy as a way to gain greater control over the receipt and routing of incoming mail. ACLI is in agreement with the comments received by the Commission pointing out that a person intent on hiding their identity in order to commit fraud can do so just as easily with a false street address as with a false or non-existent post office box.

ACLI urges the Commission to retain Proposed Rule Section 316.2.(p) as proposed.

Creation of a "safe harbor" for advertisers

The Commission seeks comment on recognition of a "safe harbor" in connection with advertisers that utilize third parties to send and manage commercial e-mails. *Section VII(B)(1)(c) & (d).* ACLI proposes that in the context of an advertiser contracting with a reputable e-mail services vendor to conduct e-mail campaigns for the advertiser, there should be the ability to shift responsibility for CAN-SPAM compliance from the advertiser to the vendor, provided due diligence is performed by both parties and the respective duties and responsibilities of each party are clearly set forth in the agreement. ACLI urges the adoption of such a "safe harbor", and offers the following criteria for consideration:

> Opt-out and other obligations may be transferred from an advertiser(s) to an e-mail list provider or other third party provided that: (1) The advertiser and the vendor have each conducted thorough due diligence of the other party's privacy and computer security policies and practices, as well as their system capabilities prior to entering into the contract; (2) the advertiser and the vendor have clearly set forth their respective duties and responsibilities in the agreement regarding all aspects of CAN-SPAM compliance; and (3) the agreement provides for each party to have the right to audit on an ongoing basis the other party's privacy and computer security policies and practices and system capabilities.

ACLI believes that if the above-listed criteria are met, consumers would be fully protected from violations of CAN-SPAM, and that it would be appropriate for the Commission to view certain CAN-SPAM obligations to have been shifted pursuant to the agreement. At the very least, if a negligent act of the third party results in a violation of CAN-SPAM, the advertiser(s) should not be held accountable by the Commission for an aggravated violation.

"Forward-to-a-Friend" Programs

ACLI believes the current guidance with respect to "forward-to-a-friend" programs is sound, but there remain concerns with respect to the commentary on the term "induce". ACLI agrees that if consideration is exchanged, the party supplying the consideration should logically be held responsible for ensuring compliance with the Act. However, as the Commission points out, the term "induce" is broad and can

encompass "something that is designed to encourage" the recipient to forward the message. This is much too ambiguous. Under this test a sender that employs attractive copy could be deemed in hindsight to have "induced" the recipient to forward the message. In such cases the original sender would have no functionality that would allow it to know its message was forwarded; or to whom the message was forwarded. ACLI believes the more reasonable guidance is link "inducement" to the actual exchange of consideration, which is an objective, foreseeable test for the sender.

Conclusion

In sum, ACLI strongly urges the Commission to increase the ten business day opt-out processing period to thirty calendar days, consistent with the Commission's telemarketing sales rule. ACLI requests that the Commission modify the definition of the term "sender" to accommodate the unique situation of the insurance industry, and other industries that share similar characteristics. ACLI also supports the proposed definition of "valid physical postal address". ACLI supports the creation of a "safe harbor" by which advertisers may contractually shift opt-out and other obligations to third party vendors, provided specified safeguards are met. Finally, ACLI urges the Commission to clarify that the "sender" of a "forward-to-a-friend" program is the consumer absent an actual exchange (or offer) of consideration.

Thank you for your consideration.

Sincerely yours,

David M. Leifer